No. 01-1778 (4)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

THE HONORABLE JOHN MCBRYDE,

Petitioner,

v.

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Counter-Statement Regarding Questions Presented

Petitioner presents four questions for the Court's consideration. Questions 2 and 4 assume that Petitioner was sanctioned under the Judicial Conduct and Disability Act of 1980 (the "Act") based on the merits of his substantive and procedural rulings. As set forth in the Counter-Statement of the Case, that assumption is not only inaccurate, but each and every one of the administrative bodies (all comprised of Article III judges) empowered and obligated under the Act in these proceedings, as well as the District Court below, has determined to the contrary. (Pet. App. 89a-96a, 143a-49a, 159a-60a.) The Court of Appeals did not reach the question, but, as is evident from both the majority and dissenting opinions in the Court of Appeals, all three members of the panel were of the view that Petitioner's conduct, at least in certain instances, was abusive and properly sanctionable under the Act. (Pet. App. 22a-24a, 28a, 45a.) Similarly, Petitioner's Question 4 assumes that the Judicial Council and the Judicial Conference exceeded the authority granted them on the face of the Act. They did not, as both the District Court and the Court of Appeals determined. (Pet. App. 16a-17a, 54a, 88a-96a.)

Statement Pursuant to Supreme Court Rule 14.1(b)

Respondents adopt Petitioner's Rule 14.1(b) statement.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents are the Judicial Council of the Fifth Judicial Circuit (the "Council"), the Review Committee of the Judicial Conference (the "Judicial Conference" or the "Review Committee"), and the Honorable William J. Bauer (Chairman of the Review Committee).[1] Respondents do not dispute that Petitioner, the Honorable John McBryde, rhetorically invokes many important principles. In particular, Respondents – an Article III judge and two administrative bodies comprised of 23 additional Article III judges – are, on a daily basis, acutely conscious of the importance of judicial independence to each Article III judge and to the entire Judicial Branch. At the same time, Respondents are charged by Congress with the duty and responsibility to administer the Judicial Conduct and Disability Act of 1980, legislation which Congress crafted and, at the urging of the Judicial Branch, entrusted to the Judicial Branch to administer. As important as the concepts that Petitioner invokes are to every Article III judge, those concepts would not be meaningfully elucidated by review of the decision below, and Respondents respectfully submit that, based on the standards articulated by the Court that inform the discretionary grant of certiorari, the Petition should be denied.

Counter-Statement of the Case

Petitioner attempts to raise questions about the constitutionality of the Act. To explain and, Respondents hope, to defuse the use of characterization, by the terms "sanction" or "discipline" (Petitioner uses the term "punishment") Respondents mean the imposition of some consequence other than impeachment for improper conduct or behavior. This Court last addressed questions of discipline of Article III judges 32 years ago, and has never addressed the Act. A brief review of the historical and statutory context is necessary for this Court's

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[1] Honorable Henry A. Politz, former chief judge of the Fifth Circuit, was an appellee below but died prior to the filing of the Petition.

consideration of whether review of this case is appropriate.

A. Statutory Framework

The procedures embodied in the Act that were employed in the proceedings against Petitioner were developed over a long period of years to address the ever-increasing concerns as to the need for judicial council oversight authority with respect to the conduct of judges. The issues raised by Petitioner were carefully considered and rejected by Congress in the interests of developing a practically administrable system of addressing improper judicial conduct.

1. Origins of the Act

At the urging of Chief Justice Hughes and other prominent jurists, in 1939 Congress created judicial councils for each circuit (then composed only of judges from courts of appeals) and empowered judicial councils to "make all necessary orders for the effective and expeditious administration of the business of the courts" in each circuit. *See* 28 U.S.C. § 332(d)(1); *see also* Administrative Office Act of 1939, Pub. Law No. 76-299, 53 Stat. 1223 (1939 version of legislation). It was not considered necessary for this legislation to contain an explicit textual provision authorizing judicial councils to impose sanctions or even enforcement mechanisms (*e.g.*, contempt or subpoena power).[2] The authority of circuit judicial councils under Section 332 was thought to be broad and to extend to taking action to "avoid[] any stigma, disrepute, or other element of

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[2] When this omission was noted by Representatives Cellar and Chandler at the hearing on the bill, Hon. D. Lawrence Groner, Chief Justice of the Court of Appeals for the District of Columbia, commented in language and perspective that may sound quaint today, that he could not conceive that any judge, "when he is admonished by this council of judges that he must do in accordance with the report made to him a particular thing to correct what is regarded as an abuse, . . . will fail to do it." *Hearings on H.R. 2973, H.R. 5999 Before the Committee on the Judiciary of the House of Representatives*, 76th Cong., 1st Sess., at 14 (March 2 & April 15, 1939).

loss of public esteem and confidence in respect to the court system, from the action of a judge or other person attached to the courts." Report of the Proceedings of the Judicial Conference of the United States, 51 (1961). This Court's decision in *Chandler v. Judicial Council*, 398 U.S. 74 (1970), focused attention on the ability of circuit judicial councils to discipline a judge who refused to comply with a council order. In that case, ultimately dismissed on exhaustion grounds, this Court nevertheless endorsed the authority and ability, under Section 332, of circuit councils to take action – sanctions or discipline – to obtain compliance with their orders. In doing so, this Court rejected what can be called an absolutist view of judicial independence set forth in the dissent of Justice Black, joined by Justice Douglas, which would prohibit the imposition of any consequences on any Article III judge short of impeachment.

In the decade following *Chandler* Congress enacted a series of laws directed at disclosure and reporting by, and accountability of, persons holding positions in the Executive, Legislative, and Judicial Branches. In this context, Congress considered a number of bills that would have supplemented Section 332 by establishing specific judicial discipline procedures and sanctions — including provisions for the removal of Article III judges. These bills faced opposition — on the ground that the Impeachment Clause of the Constitution provides the sole means of removing a federal judge — and were not adopted. *See generally* Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. Pa. L. Rev. 283, 291-92 (1982).

After much consideration and debate concerning the proper structure and scope of legislation, Congress adopted the Act in 1980. *See* Pub. Law No. 96-458, 94 Stat. 2035 (1980). This legislation left responsibility for the investigation of conduct of judges and other personnel within the Judicial Branch and for the imposition of legislatively defined consequences primarily with the existing circuit judicial councils. Several key points

emerge from a review of the legislative history of the Act.

First, following resignations first of a Vice President and then of a President, Congress enacted various legislation as part of a broad effort through reporting, disclosure, and other requirements to improve the accountability of, and public confidence in, members of all three Branches of Government. The Act was part of that effort.[3]

Second, the Act created detailed provisions for the investigation of judicial conduct and the specific authorization of consequences for misconduct, which were new, and for the investigation and determination of the possibility that a federal judge may have become disabled, which were issues Congress had entrusted for more than 200 years to federal judges.[4]

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[3] *See, e.g., Judicial Discipline and Tenure: Hearings Before the Subcommittee on Judicial Machinery and Constitution of the Senate Committee on the Judiciary*, 96th Cong., 1st Sess. 71 (1979); *Judicial Discipline and Tenure: Hearings Before the Subcommittee on Court, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 96th Cong., 1st & 2d Sess. 130 (1980) (hereinafter "*House Hearings*") (statement of Rep. Rodino).

[4] Some of the Section 372(c) proceeding involving Petitioner included an investigation of possible mental disability. (Pet. App. 167a-69a.) The Petition refers to such inquiries in ways which might be read to suggest impropriety. Congress has long provided a mechanism, short of impeachment, to address issues of mental and physical disability of federal judges, and entrusted the administration thereof to Article III judges. In 1801, legislation provided that upon "satisfactory evidence" of "the inability of the district judge . . . to perform the duties of his office," the "circuit court" "shall" direct a circuit court judge to perform the district judge's duties "for and during the period the inability of the district judge shall continue." Act of Feb. 13, 1801, ch.4, § 25, 2 Stat. 89, 97. In 1809, Congress created a system wherein the federal marshal or district attorney could submit evidence of a district judge's disability to the appropriate Supreme Court justice; if the district judge was determined disabled he was relieved of duties for the period of disability. Act of March 2, 1809, ch. 27, 2 Stat. 534. In 1850, Congress enacted legislation which remained in place for almost 70 years, providing for certification of the disability of a district judge by the clerk of the court to the circuit judge and the designation by the circuit judge of

Third, in drafting and revising the Act, Congress "inquired with great care into any possible constitutional objections to the proposed legislation." H.R. Rep. No. 96-1313, 96th Cong., 2d Sess. 17 (1980); *see also* H.R. Rep. No. 101-512, 101st Cong., 2d Sess. 10 (1990). The House Judiciary Committee heard extensive testimony on the constitutionality of the Act, *see, e.g.*, *House Hearings*, *supra* note 3, at 20-21, 30-38, 82-83, 93, 130-33, 137-39, 153-56, 169, 174-76, 180-81, and reviewed a study prepared by the Library of Congress analyzing the constitutionality of the Senate bill. *See Constitutional Issues Raised by the Proposed Judicial Conduct and Disability Act of 1979* (American L. Div., Oct. 24, 1979), *reprinted in House Hearings*, *supra* note 3, at 697. The Senate also analyzed this issue at length. *See* 125 Cong. Rec. S15389-93, S1412 (daily ed. Oct. 30, 1979). Both House and Senate leaders agreed that the legislation was crafted "to maintain the independence and autonomy of the judicial branch of government." H.R. Rep. No. 96-1313, *supra*, at 1; 126 Cong. Rec. S13,858 (daily ed. Sept. 30, 1980) (remarks of Sen. DeConcini).[5]

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substitutes during the period of disability. Act of July 29, 1850, ch. 30, 9 Stat. 442. In 1919, Congress altered the system for dealing with judicial disability and enacted legislation which authorized the President to certify that a federal judge was disabled and to appoint (with the advice and consent of the Senate) a new judge. Act of Feb. 25, 1919, ch. 29, sec. 6, § 260, 40 Stat. 1156, 1158. The current Section 372(b) of Title 28, enacted in 1957 (and not substantively modified since then), authorizes the President, upon the certification of a majority of a judicial council that a judge is permanently mentally or physically disabled, to appoint (with Senate confirmation) a new judge.

[5] As a result of its oversight activity, Congress passed the Judicial Improvements Act of 1990, Pub. Law No. 101-650, 104 Stat. 5089 (1990), which, *inter alia*, made certain minor changes to the Act and granted circuit councils the power to institute contempt proceedings in order to enforce their orders. *See* 28 U.S.C. § 332(d)(2).

2. The Provisions of the Act

The Act sets forth the process by which a circuit judicial council may address complaints that a federal judge has engaged in "conduct prejudicial to the effective and expeditious administration of the business of the courts" or is "unable to discharge all the duties of office by reason of mental or physical disability." 28 U.S.C. § 372(c)(1).

"Any person" may file a complaint under Section 372(c)(1). Upon receipt of such a complaint, the Clerk transmits the complaint to the chief judge of the circuit and to the subject of the complaint. 28 U.S.C. § 372(c)(2). The chief judge reviews the complaint, § 372(c)(3), and then either dismisses it, § 372(c)(3)(A) & (B), or appoints a special committee (required to be composed of the circuit chief judge and equal numbers of circuit and district judges from the circuit) to investigate. § 372(c)(4)(A).

When a chief judge determines that an inquiry is warranted, the special committee is authorized to conduct an investigation "as extensive as [the special committee] considers necessary," § 372(c)(5), with full subpoena powers. § 372(c)(9)(A). Judicial councils are authorized to adopt rules of procedure. § 372(c)(11). An investigation culminates with a "comprehensive written report" submitted to the judicial council, setting forth both the findings of the investigation and recommendations for necessary and appropriate action by the judicial council. § 372(c)(5). A judicial council is statutorily authorized, *inter alia*, to take various prescribed kinds of disciplinary action. § 372(c)(6)(B)(i)-(vii).

After a judicial council issues an order pursuant to Section 372(c)(6), a complainant, judge, or magistrate "aggrieved by [the] action of the judicial council under [Section 372(c)(6)] may petition the Judicial Conference of the United States for review thereof." 28 U.S.C. § 372(c)(10). Section 372(c)(10) further provides that after review by the Judicial Conference

"all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise."

B. The Proceedings Under the Act

1. The Investigation by the Special Committee

This case arises out of an investigation of complaints of judicial misconduct concerning Petitioner conducted by the Judicial Council under the Act. On September 13, 1995, the late Henry A. Politz, then Chief Judge of the Fifth Circuit, appointed a special committee (the "Special Committee"), with directions to investigate and report on complaints of judicial misconduct against Petitioner. Three additional complaints relating to Petitioner were subsequently referred to the Special Committee. During its investigation of the complaints, the Special Committee also became aware of additional incidents and patterns of conduct concerning Petitioner, and so expanded the scope of its investigation as authorized by the Fifth Circuit's Complaint Rule 9(A) adopted pursuant to the authorization set forth in Sections 372(c)(5) and (c)(11).

Evidentiary hearings did not commence for almost two years for reasons and due to proceedings explained in the Report. (Pet. App.167a-72a.) Petitioner was given notice of the expanded investigation and the issues to be raised at the hearings. In August, September, and October 1997, the Special Committee held nine days of evidentiary hearings, during which fifty-five witnesses testified. The Special Committee also received in evidence court transcripts and other documentary exhibits. The description of the investigation and the findings and recommendations of the Special Committee are contained in a detailed, 159-page report by the Special Committee (Pet. App. 163a-301a) (the "Report").

After a brief background explanation of the origin of the investigation (Pet. App.166a-73a), the Special Committee

details in the Report findings of fact with respect to twenty-two separate instances from 1991 to 1997 of Petitioner's conduct with officials, practitioners, prosecutors, public defenders, federal judges, a state judge, and the clerk of the court. (Pet. App. 173a-274a.) The Special Committee found that Petitioner had engaged in a serious and ongoing pattern of misconduct prejudicial to the effective administration of justice and the business of the courts, including a pattern of abusive and intemperate behavior, which had brought disrepute upon, and created discord within, the federal judiciary, and also had a chilling impact on the legal community in the Northern District of Texas. (Pet. App. 285a-86a.) The Special Committee found that witnesses who were subpoenaed in the course of its investigation faced a "well-grounded apprehension that Petitioner might retaliate against those persons who testified." (Pet. App. 288a.) This conclusion was based upon a review of actual incidents of retribution by Judge McBryde, the reticence of those who had experiences even to discuss these incidents with the Special Committee, and upon a specific incident during the proceeding that a person could conclude was an attempt by Petitioner to harass or retaliate against a witness.

2. Order of the Council

The Council issued an order (the "Council's Order") pursuant to Section 372(c)(6), which adopted three remedial measures relating to Petitioner's improper conduct. In Section 1 of the Council's Order, the Council adopted a public reprimand of Petitioner for conduct prejudicial to the administration of justice and inconsistent with Canon 2(A) and Canon 3(A)(3) of the Code of Judicial Conduct. (Pet. App. 159a-60a.)

In Section 2, the Council, pursuant to Section 372(c)(6)(B)(iv), ordered that no new cases be assigned to Petitioner for a one-year period following the effective date of the Council's Order. (Pet. App. 160a.)

In Section 3, the Council prohibited Petitioner for a three-

year period from participating in cases involving certain attorneys who received subpoenas from the Special Committee. (Pet. App. 160a.) This case reassignment provision, pursuant to Section 372(c)(6)(B)(vii), was based on the finding that a likelihood of retaliatory conduct by Petitioner against witnesses called to testify during the proceedings was substantial. (Pet. App. 288a-91a.)

3. Review by the Review Committee

On March 16, 1998, Petitioner filed seven petitions for review with the Review Committee of the Judicial Conference, which was comprised of three circuit court of appeals judges and two district court judges. On September 18, 1998, the Review Committee issued its unanimous opinion and order, rejecting each of Petitioner's objections. (Pet. App. 125a-58a.)

With respect to the decision to expand the scope of the investigation beyond the complaints, the Committee held that such expansion was specifically authorized by the Fifth Circuit's Complaint Rules (Pet. App.132a-33a); that such expansion was consistent with the Act (Pet. App. 133a-35a); and indeed that such expansion was "affirmatively desirable" in situations where there appears to be evidence of a pattern of objectionable conduct. (Pet. App. 135a.)

The Review Committee rejected Petitioner's assertion that he was being sanctioned for conduct directly related to the merits of his decisions and procedural rulings. The Review Committee found that the Council's sanctions did not arise from disagreements with the merits of his rulings, but rather out of findings that he engaged in a consistent pattern of abusive conduct. (Pet. App. 143a-49a.) The fact that the evidence of this abuse was largely revealed in the judge's rulings, statements and conduct on the bench did not shield it from investigation and sanction. (*Id.*) The Review Committee found this determination supported by its prior decisions. (Pet. App. 144a-46a.) The Review Committee specifically affirmed the factual

findings underlying the Council's Order.

Finally, reaching the sanctions imposed by the Council's Order, the Review Committee affirmed the Council's public reprimand sanction (Section 1) and the directive that certain cases be reassigned from Petitioner because of the potential for retaliation against certain witnesses in these proceedings (Section 3). (Pet. App. 149a-150a, 155a-158a.) With respect to the one-year suspension of new case assignments (Section 2), the Review Committee found that such a suspension was justified as a remedial measure, but not as a punitive one. Because the Council intended the suspension of new case assignments to serve a very substantial remedial purpose, the Review Committee affirmed the one-year suspension with the proviso that the suspension would be terminated short of a year should Petitioner demonstrate that "he has seized the opportunity for self-appraisal and deep reflection in good faith and that he has made substantial progress toward improving his conduct." (Pet. App. 154a.)

C. The District Court's Decision

On October 15, 1998, Petitioner filed a Complaint for Declaratory, Injunctive, and Mandamus Relief against Respondents (the "Complaint"). The Complaint asserted eight counts, challenging the Council's Order and Review Committee's decision on constitutional grounds, challenging the factual findings upon which the Council's Order is based, and seeking a declaratory judgment (i) that the Act, pursuant to which the Council's Order and the Review Committee decision were issued, is unconstitutional on its face and, in the alternative, that the statute is unconstitutional as applied to him; and (ii) that the Council's Order and the Review Committee decision are unlawful under the Act and the Complaint Rules. The United States was granted leave to intervene to defend the facial constitutionality of the Act.

On December 30, 1999, the District Court entered judgment,

dismissing most of the Complaint.[6] The District Court determined that the Act does not usurp or encroach upon the power of impeachment that resides with the Legislative Branch, nor does it jeopardize judicial independence, which stands to be enhanced by judicial self-monitoring. (Pet. App. 54a.) Rather than authorizing review of the merits of a judge's legal decisions, the Act authorizes review of a judge's "alarming or destructive pattern of conduct" and therefore does not threaten the Article III function. (*Id.*) The District Court also rejected Petitioner's contentions that Respondents exceeded their authority under Act and applied the Act unconstitutionally to Petitioner. The District Court concluded that Respondents "confined their investigation to a pattern of behavior towards attorneys and others, which they found demonstrates intemperance and abusiveness" and that "the sanctions levied against Judge McBryde did not transgress into the forbidden realm of impeachment, but rather were limited in scope and tailored to the problem that his behavior posed." (*Id.*) The District Court held that the Review Committee's upholding of the sanctions against Petitioner and its rejection of Petitioner's argument that he was sanctioned based on disagreement with the merits of his rulings "reflect[ed] deep respect for the important distinction between the merits of a judicial decision and the conduct of the judge rendering that decision." (Pet. App. 91a.)

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[6] Count 8 of the complaint alleged that the confidentiality provision of the Act, 28 U.S.C. § 372(c)(14), on its face and as applied, violated the First Amendment. Respondents said from the outset that they had no objection to the public release of virtually the entire record, but for certain individual privacy and institutional reasons wished to keep confidential a certain narrow category of information about individuals and the psychiatric aspect of the investigation. The District Court determined that, as applied to Petitioner at that stage of the proceedings, any restriction on the public dissemination of the underlying record violated the First Amendment. (Pet. App. 120a.) Respondents did not appeal.

D. Decision of the Court of Appeals

On September 21, 2001, the Court of Appeals affirmed in part and vacated in part. The Court of Appeals determined that to the extent Petitioner's claims distinctively related to the one-year suspension of new case assignments and the three-year disqualification sanction, they were moot. (Pet. App. 3a.) With respect to Petitioner's as applied constitutional challenges (based on separation of powers, judicial independence and due process) and his statutory claims, the Court of Appeals determined that the review preclusion provision of the Act barred review. (Pet. App. 15a-17a.) Accordingly, the Court of Appeals did not reach the merits of Petitioner's challenge to the District Court's rejection of his as applied constitutional claims. The Court of Appeals, however, did reach and unanimously rejected Petitioner's remaining facial constitutional challenges on the merits. (Pet. App. 17a-24a.)

One member of the panel dissented from the determination that the review preclusion provision of the Act (28 U.S.C. § 372(c)(10)) barred review of Petitioner's as applied constitutional claims. The dissent concluded that one of Petitioner's three "as applied" claims – namely, that the Act as applied to Petitioner violated judicial independence – had merit. The dissent reasoned that some of the instances catalogued in the Report were in its view sufficiently egregious by themselves to warrant rejecting Petitioner's as applied claims: "Had the Council restricted its report to incidents like these, I would have no trouble rejecting [Petitioner's] as-applied challenge, for no reasonable judge would think behavior like this appropriate." (Pet. App. 45a (Tatel, J., dissenting).) But, because other of the instances seemed, to the dissenter, to be less egregious or not egregious at all, the dissent concluded that their inclusion in the report risked "chilling legitimate conduct by other judges." (*Id.* 46a.) Accordingly, the dissent urged that Article III judges should not be disciplined under the Act unless their conduct is

"clearly abusive" of judicial power. (*Id.* 42a-44a.)[7]

E. The Petition Mischaracterizes the Findings and Conclusions of the Special Committee and Council

The Petition presents a distorted version of the findings and conclusions of the Special Committee and the Council, suggesting that the findings of "arbitrary", "abusive", and "intimidating" conduct by Petitioner were based on trivialities, such as the prohibition on newspapers in his courtroom or the requirement that parties and witnesses wear jackets and ties in jury trials (Pet. 7). As the Report itself reflects, that is not true. The Report never mentions such rulings as a basis for the Special Committee's findings. To the contrary, as was recognized by the District Court below, the disciplinary proceedings against Petitioner based on the incidents described in the Report evidenced that he was a jurist "plagued by intemperance, abusiveness, and profound lack of collegiality" (Pet. App. 90a) and that his "pattern of conduct" raises "profound concerns regarding not only the Fort Worth legal community, but also the American legal profession more generally." (Pet. App. 95a.)

Respondents respectfully refer the Court to the Report (Pet. App. 163a-301a), as well as the District Court's summary of several of the incidents supporting the Council's findings of

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[7] The dissent did not explain the statutory or constitutional analytical steps that led to the "clearly abusive" legal conclusion articulated and therefore raises more difficult questions than it purports to answer. The dissent does not explain how the language of the Act, which all panel members agreed is constitutional on its face and which authorizes discipline if a federal judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts," 28 U.S.C. § 372(c)(1) – the identical standard of Section 332 in existence since 1939 and involved in *Chandler* – is construed or found to contain a "clear abuse of judicial power" limitation so that it can be both facially constitutional and unconstitutional as applied. Nor does the dissent explain the source or the scope of this non-textual constitutional limitation on Congress's power to enact necessary and proper legislation with respect to the inferior courts it creates and funds.

patterns of abusive conduct (Pet. App. 60a-67a). The District Court's decision echoes the Review Committee's determination, based on a review of the record, that there was an "impressive mound of evidence that [Petitioner] has frightened and intimidated a significant portion of the local bar" and that the evidence was "more than sufficient to support the judicial council's findings [of patterns of intemperate, abusive and intimidating conduct]." (Pet. App. 148a-49a.) These findings and the underlying record stand in sharp contrast to the version of the evidence, the record, and the findings presented in the Petition.

REASONS FOR DENYING THE WRIT

The Petition should be denied because there is no conflict among any courts of appeal with respect to any issue presented in the Petition. Indeed, to the extent any court of appeals, in addition to the court below, has addressed any of the issues presented, it is in accord with the court below, and all of Petitioner's arguments are without merit. Moreover, the asserted errors do not involve a misstatement of any rule of law, but only asserted misapplications of properly stated rules of law to a complex and lengthy factual record of conduct by Petitioner reviewed by the Council and the Review Committee. Such asserted errors, even were they established (which they are not as set forth below), are not grounds to warrant discretionary review by the Court. The underlying basis for the Petition is Petitioner's assertion that the factual findings and procedural determinations of the Special Committee, the Council, and the Review Committee were erroneous and unsupportable. Such fact-laden arguments likewise do not warrant the grant of the Petition, particularly in light of the Act's finality provision.

I. The Determination of the Court of Appeals That Section 372(c)(10) of the Act Precludes Judicial Consideration of As Applied Constitutional Claims Does Not Conflict with Decisions of This Court, Is the Uniform Holding of Every Circuit That Has Addressed the Issue, and Presents No Question Warranting Review by This Court

The Court of Appeals' determination that 28 U.S.C. § 372(c)(10) precludes as applied constitutional challenges of the Act does not present an issue meriting review by this Court. As shown below, what Petitioner characterizes as a conflict is not that, but his disagreement with interpretation of the legislative history and Congressional intent underlying the Act.

The decision below does not conflict with decisions of the Court. No matter how strongly Petitioner attempts to characterize the presumption articulated by this Court, that "[w]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear," (Pet. App. 9a) (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)), Petitioner cannot dispute that the Court of Appeals applied that presumption in analyzing the language and legislative history of the Act. The Court of Appeals recognized that only "clear and convincing" evidence of congressional intent to preclude would satisfy the "especially high hurdle" a claim of preclusion faces when the Constitution is invoked, both for facial and as applied constitutional challenges to the Act. (Pet. App. 9a-10a.) The Court of Appeals analyzed the legislative history surrounding Section 372(c)(10), and the purposes of the Act's provisions establishing that all the initial, determinative, and review proceedings were conducted by Article III judges, and determined that the "requisite clarity of preclusive intent" existed. That application of *Webster* does not amount to a conflict with controlling precedents of this Court.

Nor is there any conflict among the Circuits. The Third

Circuit has held that the Act's finality provision bars as applied constitutional claims. *See Cunningham v. Becker*, 275 F.3d 34 (3d Cir. 2001) (affirming district court holding that Section 372(c)(10) denied courts "jurisdiction to consider challenges to the decisions by the Chief Judge or the Judicial Council except to the extent the complaint challenges the constitutionality of the statute itself (as opposed to the constitutionality of the statute as applied)") (unpublished opinion *affirming Cunningham v. Becker*, 96 F. Supp. 2d 369, 373 (D. Del. 2000)).[8] And, a fair reading of a decision Petitioner does point to, albeit incorrectly, *In re McBryde*, 117 F.3d 208 (5th Cir. 1997) (*McBryde I*) (Pet. App. 315a-358a), shows that the Fifth Circuit has determined that Congress clearly intended to withdraw jurisdiction regarding constitutional claims through the Act's finality provision. *Id.* at 222 (Pet. App. 340a-41a.) There, similar to the "as applied" claim by Petitioner in this case, Petitioner asserted, *inter alia*, that the Council's treatment of him under 28 U.S.C. § 332 violated his right to judicial independence. Quoting the same language from *Webster*, the Fifth Circuit determined that, unlike 28 U.S.C. § 332, the Act's finality provision "withdraws jurisdiction to consider the

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[8] The Third Circuit's opinion, a copy of which has been lodged with the Court, pointedly demonstrates but some of the consideration motivating Congress to preclude judicial review. *Cunningham* involved an attempted "as applied" constitutional challenge in federal court by a litigant aggrieved by the Chief Judge's decision to dismiss Section 372(c) complaints filed against an Article III judge. Absent preclusion of such "as applied" claims, the threat to the values Petitioner invokes would, Respondents submit, be far greater. The vast majority of Section 372(c) complaints are brought by aggrieved litigants and are dismissed by chief judges under Sections 372(c)(3)(A) or (B). Few lead to proceedings, and even fewer lead to council action under Section 372(c)(6). Permitting "as applied" constitutional claims would thus routinely subject chief judges, object judges, and judicial councils to litigation in federal courts by such aggrieved litigants. Even somehow reading Section 372(c)(10) to permit "as applied" challenges limited to some type of "clear abuse of judicial power" standard (as urged in the dissent below), would have the same adverse effects.

validity of council orders." *Id.* (stating that "'where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear") (quoting *Webster*, 486 U.S. at 603); *see also id.* at 220 & n.7 (Pet. App. 336a.)

In an effort to demonstrate that a review-worthy conflict exists, Petitioner points to decisions involving a different statute (Pet. at 13-14) and to what are claimed to be conflicts within the District of Columbia Circuit. The Court rarely if ever grants *certiorari* to resolve alleged intra-circuit conflicts, a role appropriate for an *en banc* proceeding by the particular circuit. The cases relied upon by Petitioner reached different conclusions on the fundamental non-reviewability issue decided below based on readings of different statutory language enacted in different contexts. None of the cases involved Section 372(c)(10) or the Act. *See, e.g.*, *Lepre v. Dep't of Labor*, 275 F.3d 59 (D.C. Cir. 2001); *Ralpho v. Bell*, 569 F.2d 607, 620-21 (D.C. Cir. 1997); *Griffith v. FLRA*, 842 F.2d 487; 494-95 (D.C. Cir. 1988); *Ungar v. Smith*, 667 F.2d 188, 193 (D.C. Cir. 1981). These decisions are not inconsistent with the Act or the decision of the Court of Appeals below with respect to Section 372(c)(10). Indeed, in *Lepre*, which Petitioner asserts is in direct conflict with the decision below, the panel explicitly reasoned that the different statutory structure of Section 372(c) explained the different results: "[*McBryde*] involved Article III judges reviewing a challenge to the imposition of judicial discipline, albeit not in the usual court context; no such circumstances exist in the instant case." *Lepre*, 275 F.3d at 68.

Nor do Petitioner's claims that the Act was wrongly interpreted by the Court of Appeals warrant review. Petitioner's argument ignores a fundamental aspect of the entire Act and Section 372(c), which informed both Congress's decisions regarding judicial review and the reasoning below. Petitioner's characterization of the Judicial Council and Review Committee as "subordinate" administrative bodies "free to trample constitutional rights without judicial oversight," (Pet. 13), fails to

acknowledge that both of these bodies are entirely comprised of Article III judges. Congress vested judicial discipline with a group of Article III judges, and provided for review by yet another group of Article III judges.

The court below in its review of legislative history recognized that Congress, in its consideration of what would become the Act, was fully aware of the concerns raised in *Robison* and other decisions of this Court. *See Johnson v. Robison*, 415 U.S. 361, 366-67 (1974); *Weinberger v. Salfi*, 422 U.S. 749, 761-62 (1975); *Territory of Guam v. Olsen*, 431 U.S. 195, 201-02, 204 (1977). At every step of Petitioner's proceedings, findings of fact and law have been made solely by Article III judges. The Special Committee was comprised of five Article III judges – three appellate judges and two district judges. The Judicial Council that disciplined Petitioner was also comprised of fourteen additional Article III judges. The Review Committee to which Petitioner appealed was also comprised of five Article III judges, none from Petitioner's circuit – three appellate judges and two district judges. Furthermore, the Court of Appeals' examination of the legislative history revealed that the Review Committee of the Judicial Conference was designated as the reviewing body in order to avoid inviting large numbers of complaints against judges by dissatisfied litigants, which could have the effect of chilling judicial decision making. (Pet. App. 11a-13a.) *See also Cunningham*, 275 F.3d 34.

Contrary to Petitioner's assertion that the Court of Appeals "mustered no support in the language or history of the statute to support the notion that Congress clearly intended to preclude as applied challenges while permitting facial ones," (Pet. 13), the court's analysis of the legislative history revealed precisely the opposite: an intention on the part of Congress to permit judicial review of facial constitutional claims, to permit litigants to test and the courts to examine the constitutionality of Congress's own action (enacting the Act), while precluding "as applied" claims to avoid opening the door to numerous individual

challenges to the administration of the Act, because the Act is administered by Article III judges. Unlike other statutory schemes where Congress leaves the administration of the statute to executive personnel with no judicial training or experience, the Act is administered by Article III judges whose training and experience distinguish them from the administrators of other statutory schemes.[9]

II. Petitioner's "As Applied" Constitutional Arguments Present No Conflict Among the Circuits and Do Not Warrant Review by This Court

Petitioner requests this Court to address one of his three "as applied" constitutional claims: whether "punishing" an Article III judge "based on the merits" of his "rulings" and "actions" violates "judicial independence." (Pet. i). But there are, Respondents submit, several preliminary reasons to deny review of the question Petitioner presents.

Petitioner requests this Court to review the above-quoted question independent of whether this Court agrees to review the determination of the court below that Congress intended that federal courts not entertain "as applied" constitutional challenges to the Act. Normally the Court will first decide that it has authority to address an issue before it addresses that issue. *Cf. Florida v. Thomas*, 532 U.S. 774, 777 (2001); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Unless this Court granted *certiorari* and then reversed the judgment below on the merits of the first question Petitioner raises (Pet. at i, Question 1), precedent suggests that, at least for prudential if not other considerations, the second question Petitioner seeks to raise is not appropriate for review.

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[9] Moreover, and recognizing that it is distinct from the legal issue, the lack of definition and clarity of the nature of Petitioner's "as applied" constitutional claims would make this case a poor vehicle to address such a legal question even if it were otherwise appropriate to do so.

Moreover, this Court has repeatedly stated that it does not review factual matters, *see, e.g.*, Sup. Ct. R. 10; *United States v. Johnston*, 268 U.S. 220, 227 (1925) (stating that the Court does "not grant certiorari to review evidence and discuss specific facts"); *NLRB v. Waterman S.S.*, 309 U.S. 206, 208 (1940), and especially as a court of first instance to do so.

Indeed, both the question Petitioner presents and his "as applied" arguments ask this Court to assume that anything a federal judge does as a judge is a "ruling" or "action" that is "based on the merits" and any consequence authorized by the Act is "punishment." In proceedings below, Petitioner accepted that a federal judge's racial epithets delivered from the bench, or a federal judge's physical assault in court of a party or a litigant, is a "ruling" or "action" that is "based on the merits" for which no "punishment" may constitutionally attach. Respondents respectfully suggest that where a petitioner has deliberately selected to frame a question that requires this Court to accept certain legal characterizations, this Court should not rewrite the question but simply deny review.[10] *Cf.* Sup. Ct. R. 14.1(a) & 14.4 (directing that questions presented should not be argumentative and that failure of a petitioner to present with accuracy, brevity and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is a reason to deny a petition).

Furthermore, Petitioner requests this Court to decide that the sanctions violate the principle of judicial independence (Pet. 16), but Petitioner does not describe or define that claim, much less put it in the context of the question he presents (*see* Pet. i, Question 2). Indeed, all of Petitioner's "as applied" constitu-

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[10] The question, appropriately presented, would be "based on the factual findings and the factual conclusions of the adverse effect on the administration of justice and the business of the courts in the Northern District of Texas, does judicial independence constitutionally prevent a public reprimand, a preclusion of new case assignments for up to one year, or the reassignment of cases to prevent retaliation against witnesses?"

tional claims are difficult to parse, running a spectrum from "evidence-intensive" (Pet. 16, n.2) due process[11] based on charges of bias, rules violations, inadequate notice, and "other pervasive irregularities," to structural due process (unconstitutional to combine investigatory and adjudicative functions), to an "as applied" separation of powers claim indistinguishable from his facial constitutional challenges (disciplinary proceedings against him violated separation of powers because a judge cannot be disciplined other than through impeachment by Congress). In addition, there is no attempted explanation of why it was unconstitutional to publicly criticize him, to not assign him new cases for up to one year, or to prevent him for three years from sitting in cases involving lawyers who testified against him.

Petitioner suggests that implying consequences based on findings of "patterns" of conduct over time is "even more" unconstitutional. (Pet. 18.) Petitioner ignores that the Act has been interpreted and applied where a judge's "patterns" of behavior or "systematic" problems are involved, as distinct from individual decisions, *see, e.g.*, *In re McBryde*, 117 F.3d 208, 230 (5th Cir. 1997); *In re Charge of Judicial Misconduct*, 782 F.2d 181, 181 (9th Cir. 1986); *In re Charge of Judicial Misconduct*, 613 F.2d 768, 768 (9th Cir. 1980); *In re Charge of Judicial Misconduct*, 595 F.2d 517, 517 (9th Cir. 1979); *In re Charge of Judicial Misconduct*, 593 F.2d 879, 881 (9th Cir. 1979); *In re Complaint of Judicial Misconduct*, 2 Cl. Ct. 255 (1983), and does not explain how this impacts his claim.

Petitioner's "as applied" claim is predicated on a view of judicial independence as a value that would insulate Petitioner

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[11] The very nature of Petitioner's vague "as applied" constitutional due process claims, which were rejected by the District Court on the merits (Pet. App. 98a-100a), support the wisdom of Congress's judgment and that of the Third Circuit in *Cunningham* that Section 372(c)(10) precludes plaintiffs – whether they be complainants or judges – from bringing collateral "as applied" constitutional challenges to the Act.

from any of the three sanctions imposed. None of the cases Petitioner cites to bolster his concept of judicial independence articulates any principle of judicial freedom from all discipline, freedom from sanctions for any patterns of conduct, or the like, short of impeachment. While *Chandler* did acknowledge the need to protect judicial independence, *Chandler* also made clear that "it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business." *Chandler v. Judicial Council*, 398 U.S. 74, 84 (1970).[12] No authority expands the protections of Article III to encompass the kind of judicial independence Petitioner promotes, and on which his "as applied" constitutional challenge rests – one that would prohibit any sort of public criticism of a judge for a pattern of abuse, that would prohibit protecting witnesses based on factual findings that such protection was required, and that would prohibit a temporary suspension of new case assignments to allow a judge time to assess his long pattern of abusive conduct.

Finally, the argument Petitioner advances as to why the Act, as applied to him in this case, chilled or otherwise interfered with his judicial independence is vague, ignores the underlying factual findings against him, and mischaracterizes the sanctions imposed. First, as to the public reprimand, Petitioner's "as applied" challenge ignores the factual findings of Petitioner's abusive and disruptive behavior, including that Petitioner has engaged "in a continuing pattern of conduct evidencing arbitrariness and abusiveness that has brought disrepute on, and

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[12] Similarly, while *Northern Pipeline* mentions judicial independence in a footnote, the Court there was primarily concerned with separation of powers, specifically, the problems with granting supplemental and/or pendent jurisdiction over traditional state law contract claims to non-Article III bankruptcy judges, with only the usual form of appellate review. *Northern Pipeline Constr. v. Marathon Pipeline*, 458 U.S. 50 (1982). Likewise, *In re Clay* concerned itself with whether a bankruptcy court judge lacking Article III protections had the authority to conduct a jury trial. *In re Clay*, 35 F.3d 190 (5th Cir. 1994).

discord within, the federal judiciary" and that intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others has "detrimentally affected the effective administration of justice and the business of the courts in the Northern District of Texas." (Pet. App. 159a-60a.) Aside from his promotion of an absolutist view of judicial independence, Petitioner never explains why the issuance of this reprimand, which the Council determined was necessary in order to restore public confidence in the judicial system severely damaged by Petitioner's pattern of abusive conduct, is unconstitutional.

Second, as to the temporary suspension of new case assignments, Petitioner appears to contend that the Act is unconstitutional as applied because the modified suspension of new case assignments is an unconstitutional substitute for impeachment. (Pet. 18.) The suspension of new assignments does not create a constitutional problem. Petitioner was not removed from office. Petitioner's existing cases were unaffected by the Order. As the District Court found below, Petitioner still decided "cases" and "controversies" as an Article III judge. (Pet. App. 97a.) *Cf. Chandler*, 398 U.S. at 74 (declining to invalidate judicial council order which initially removed a judge's *entire* docket and then was modified to take away all new cases *indefinitely*). Moreover, although the maximum length of the suspension was fixed at one year, the minimum period of suspension of new assignments could have been less — indeed, the minimum was within Petitioner's control. Furthermore, the authorities relied upon by Petitioner as questioning the constitutionality of a temporary suspension address primarily a hypothetical situation where a suspension endures for so long that it effectively removes a judge from office completely. *Cf. Hastings v. Judicial Conference of United States* (hereinafter "*Hastings I*"), 770 F.2d 1093, 1108-09 (D.C. Cir. 1985) (Edwards, J., concurring) ("Suspension for a *fifteen year period* strikes me as being the functional equivalent of removal") (emphasis added). Such was not the case here, given the

limited duration of the suspension and Petitioner's own ability to eliminate the suspension.

Third, as to the reassignment provision, the Review Committee affirmed the determination in the Report that there was a substantial risk that Petitioner would retaliate against those individuals who testified adversely to him during the Judicial Council investigation: "[T]he Special Committee has the definite and firm conviction that the likelihood of retaliation by [Petitioner] over the short to intermediate time frame is substantial." (Pet. App. 290a.) This authority to protect witnesses is implicit in the authority to conduct a judicial complaint investigation since, if the subject of such an investigation were free to retaliate against witnesses, the conduct of the investigation would be seriously hampered. *See, e.g., In re Complaint of Judicial Misconduct*, 37 F.3d 1511, 1514 (Jud. Conf. Rev. Comm. 1994) ("The complaint mechanism of the Act will serve its purpose less well if persons who have meritorious grievances are afraid to file a complaint because they fear retaliation, or other adverse consequences, if they do so."); Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265, 345 (1993) ("testimony before the Commission, surveys, and interviews with attorneys reveal a widespread reluctance among members of the bar to file a complaint").

III. The Question of the Facial Constitutionality of the Act Is Not Appropriate For Review

The decision below on the facial constitutionality of the Act, which decision was unanimous, does not conflict with any decision of this Court or that of any other court of appeals. The other court of appeals which has addressed the facial constitutionality of the Act reached the same conclusion as the court below, *In re Certain Complaints*, 783 F.2d 1488, 1502-1515 (11th Cir. 1986) ("*Hastings II*"), and this Court subsequently cited that decision with approval, *Mistretta v. United States*, 488 U.S. 361, 390 n.16 (1989). Moreover, Petitioner does not

cite *any* judicial authority that purports to conflict with the decision below.[13]

A. Separation of Powers

The Act on its face does not disturb the balance of powers among the Branches. Congress merely allocated to adjuncts of Article III courts (judicial councils and the Judicial Conference) the authority to deal with complaints concerning judges. This Court's decisions stress a "pragmatic, flexible view" of government powers in analyzing "separation of powers" issues, rejecting "a hermetic division among the Branches," *Mistretta v. United States*, 488 U.S. 361, 380-81 (1989), and upholding as constitutional various statutes that "commingle the functions of the Branches" but pose no danger of either aggrandizing one Branch's power or encroaching on that of another. *Id.* at 382 (collecting cases); *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (upholding Article II agency's assumption of jurisdiction over state law counter-claims that could be heard in Article III courts).

In *Hastings II*, the Court of Appeals for the Eleventh Circuit rejected a separation of powers challenge to the Act. That court held that it was entirely appropriate for judges to participate in various administrative activities, including judicial discipline, related to the management of the courts, relying in part upon

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[13] Respondents note that the Petition urges this Court to review the facial constitutionality of the entire Act. (*See* Pet. i, Question 3.) Yet, the judgment below reflects that Petitioner's facial constitutional challenge to the Act was decided except for the facial challenge to one section (Section 372(c)(6)(B)(iv), authorizing the suspension of assignment of new cases), which was dismissed as moot. But Petitioner does not seek review by this Court of this aspect of the judgment. (*See* Pet. i, Question 3.) The attempt to argue in the Petition that the mootness ruling was incorrectly decided cannot overcome Petitioner's failure to seek review in this Court. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips*, 510 U.S. 27, 32 n.5 (1993); *General Talking Pictures v. Western Electric*, 304 U.S. 175, 178 (1938); *see also Adarand Constructors v. Mineta*, 534 U.S. 103 (2001).

this Court's decision in *Chandler*, 398 U.S. at 86 n.7, and emphasizing the view that the Act minimized separation of powers concerns because it assigned responsibility for judicial discipline to the Judicial Branch, not to some other Branch of government. 783 F.2d at 1505-06 & n.13. In *Mistretta*, this Court upheld the establishment of the Sentencing Commission as part of the Judicial Branch on the ground that "Congress may delegate to the Judicial Branch non-adjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary." 488 U.S. at 388. The Court wrote that it had recognized Congress's power to create a number of administrative agencies within the Judicial Branch, including the Judicial Conference of the United States, the Rules Advisory Committee, and the Administrative Office, *id.* at 388-89, and specifically cited *Hastings II* as "upholding [the] statute authorizing [a] judicial council to investigate improper conduct by [a] federal judge." *Id.* at 390 n.16. *See also Morrison v. Olson*, 487 U.S. 654, 693-96 (1988) (rejecting separation of powers challenge to the independent counsel statute).

Petitioner's argument that the Act is facially unconstitutional as a violation of separation of powers is based on this reasoning: because Congress alone has the power to impeach Article III judges for specific reasons, Congress may not direct other Branches to impose discipline (short of impeachment) upon Article III judges for misconduct and abuse. (Pet. 22-23.) Or, that the existence of one constitutional power (removal from office) in one circumstance ("Treason, Bribery, or other high Crimes and Misdemeanors") in the Legislative Branch constitutionally precludes the Legislative Branch from authorizing the Judicial Branch to impose consequences other than removal from office for different acts of conduct. But the decisions of this Court reject that reasoning, *see Mistretta*, 488 U.S. at 371-73, 390; *Morrison*, 487 U.S. at 685-96, and both the court of appeals below and in *Hastings II* specifically rejected such

attack on the Act, *see Hastings II*, 783 F.2d at 1505, 1512; Pet. App. 19a-22a. *See also Chandler*, 378 U.S. at 85 (rejecting the notion that "the extraordinary machinery of impeachment" is the only recourse when a judge refuses to abide by reasonable judicial procedures).

B. Judicial Independence

Petitioner also argues that the Act is unconstitutional on its face because it intrudes upon judicial independence. Like the court below, the only other circuit court to address this issue held to the contrary, as this Court did in addressing the identical statutory language in the Act's predecessor.

In *Chandler*, this Court, in rejecting the dissenting views of Justices Black and Douglas, concluded that the Judicial Branch — in particular, circuit judicial councils — may take reasonable steps under Section 332 to investigate and to address the conduct of individual judges prejudicial to the administration of justice. *See id.* at 86 n.7 ("no constitutional obstacle" to administrative power of circuit councils). Justice Harlan concurred, writing that while the principle of judicial independence "holds a profoundly important place in our scheme of government," he could discern "no incursion on that principle in the legislation creating the Judicial Councils and empowering them to supervise the work of the district courts, in order to ensure the effective and expeditious handling of their business." *Id.* at 129. And in *Hastings II*, the court held that judicial council actions authorized under Section 372(c)(6) of the Act were not "of a type which can powerfully interfere with a judge's independence," 783 F.2d at 1508, reiterating that the Act "facially and in broad design" was constitutional, *id.* at 1507, and the Act did not "transgress the Constitution's vision of the independence of each Article III judge." *Id.* at 1509.

Employing the major criteria articulated by this Court, the absence of any conflict demonstrates review should be denied. In addition, Respondents respectfully suggest that the extreme

proposition Petitioner advances is fundamentally wrong. The notion that any and every Article III judge is anointed with a non-textual constitutional immunity from congressionally authorized investigation of conduct (no matter how abusive) or physical or mental disability; from congressionally authorized criticism (in private or in public); or from congressionally authorized temporary suspension of additional assignments is alien to our history, our traditions, our jurisprudence, and our systemic and societal needs.

IV. Petitioner's Request To Review the Manner in Which the Disciplinary Investigation Was Conducted Presents No Question Appropriate For Review by This Court

Petitioner's final question is whether this particular investigation was improper because the Council supposedly exceeded its statutory authority in this case. To raise that question, which was not decided below because of Section 372(c)(10), Petitioner argues that *Leedom v. Kyne* should control and permit review of his case. Once reached, according to Petitioner, his statutory claims are meritorious because (i) the Act precludes a council from expanding an investigation beyond the four corners of a complaint and (ii) the Council investigated and punished him based on the merits of his decisions and, in so doing, exceeded its jurisdiction under the Act.

This Court has repeatedly stated that it does not sit to review the facts of individual cases. *See, e.g., NLRB v. Waterman S.S.*, 309 U.S. 230, 208 (1940); *General Talking Pictures v. Western Electric*, 304 U.S. 175, 178 (1938); *Southern Power v. North Carolina Public Service*, 263 U.S. 508, 509 (1924). In this case, the Review Committee examined, and rejected, each of Petitioner's contentions that the investigation of him and the proceedings involving him were inappropriate under the complaint rules and the statute. (Pet. App. 132a-40a.) The court below held that Section 372(c)(10) precluded review of these contentions. Petitioner now asks this Court to hear two

issues peculiar to him, first the application of Section 372(c)(10) to these rulings by the Review Committee,[14] and then the correctness of the Review Committee's determinations, based on the facts of the investigation of and the proceeding involving Petitioner, that the Council acted in accordance with the complaint rules and the procedural provisions of the Act.

Neither issue warrants review by this Court and, in any event, Petitioner's arguments regarding the exercise of authority beyond the scope of the Act are without merit. First, as the Review Committee determined, the Special Committee's expansion of the investigation beyond the filed complaints was specifically authorized by the Complaint Rule 9(A). Virtually identical rules have been adopted by all judicial circuits, pursuant to the authority vested in councils under Subsection (c)(11) of the Act, which authorizes "[e]ach judicial council . . . [to] prescribe such rules for the conduct of proceedings under this subsection . . . as each considers appropriate." In addition, Subsection (c)(5) of the Act authorizes a special committee to "conduct an investigation as extensive as it considers necessary[.]" As the Review Committee commented in the context of this investigation, not only was it permissible for the Special Committee to expand the scope of the investigation once it uncovered evidence of a possible pattern of abusive conduct, it was "affirmatively desirable." (Pet. App. 135a.)

Second, as to Petitioner's arguments that the Special Committee and the Council exceeded their authority under the Act

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[14] *Leedom v. Kyne*, 358 U.S. 184 (1958), did not involve a statute including a review preclusion provision, but the Court was asked to "imply" preclusion of review based upon legislative silence on the point. In numerous cases, *Kyne* has been distinguished on this ground, and statutes similar to Section 372(c)(10) have been held to preclude judicial review of claims that an agency supposedly acted in violation of statute or rule. *See Board of Governors v. MCorp Fin. Inc.*, 502 U.S. 32, 42-44 (1991); *Briscoe v. Bell*, 432 U.S. 404, 410 (1977). *See also In re McBryde*, 120 F.3d 519, 523 (5th Cir. 1997) ("*McBryde II*").

by reviewing the merits of Petitioner's decisions and procedural rulings, there is no jurisdictional limitation in the Act of the kind Petitioner suggests. The Act gives a chief judge discretion (using the word "*may*") to dismiss complaints that are "*directly* related to the merits" of a judge's rulings. *See* 28 U.S.C. § 372(c)(3)(A)(ii) (emphasis added). Moreover, as the Special Committee, the Council, the Review Committee and the two courts below have all stated, Petitioner was not disciplined based on the merits of his decisions, but rather for his abusive conduct. As the Review Committee stated, the "fact that that abuse is largely evidenced by the judge's rulings, statements, and conduct on the bench does not shield the abuse from investigation under the Act." (Pet. App. 143a.) Indeed, as the District Court below commented, the "Review Committee's analysis reflects deep respect for the important distinction between the merits of a judicial decision and the conduct of the judge rendering the decision." (Pet. App. 91a.)

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: New York, New York
August 7, 2002

Respectfully Submitted,

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